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NO. 91-819

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RUTGERS, THE STATE UNIVERSITY; BOARD OF GOVERNORS OF RUTGERS, and DR. EDWARD J. BLOUSTEIN, PRESIDENT,

Petitioners,

vs.

DR. ALFRED BENNUN,

Respondent.

OPPOSITION TO PETITION BY RUTGERS, ET. AL. FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL H. SUSSMAN
1 HARRIMAN SQUARE
GOSHEN, NEW YORK 10924
(914) 294-3991

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REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. THE DECISIONS BELOW ARE PROPER APPLICATIONS OF LAW

1. Rutgers simply seeks this Court's review of findings of fact entered by the district court at 737 F.Supp. 1393 (D.N.J. 1990) and affirmed by a unanimous panel of the Court of Appeals for the Third Circuit at 941 F.2d 154 (3d Cir. 1991). This Court should decline this invitation and not replace its judgment on findings of fact--including the ultimate fact--whether discrimination has been shown in the challenged promotion decision--for those of the courts below.

Rutgers characterizes the denial of promotion as an "honestly-held subjective judgment" (Petition at 12). But, the district court concluded to the contrary--that the reasons advanced by petition for denying Dr. Alfred Bennun

promotion to full professor in 1979-80 were "incredible" and unworthy of belief.

2. The courts below properly applied well-settled legal standards for assessing claims of intentional discrimination and concluded that Rutgers had, indeed, violated Title VII, 42 U.S.C. sec. 2000e-5, by failing to promote Dr. Bennun to the rank of full professor at its Newark campus.

3. In seeking this Court's review, Rutgers has shamefully and significantly distorted its own internal instructions to those engaged in the peer review process. To buttress its suggestion that the district court erred by comparing Dr. Bennun's qualifications for promotion with those of Dr. Ethel Somberg, a member of the same department who had been promoted to the rank of full professor the year before Dr. Bennun was

rejected, Rutgers has failed to inform this Court that its own instructions to evaluators required them to compare Dr. Bennun's achievements with Dr. Somberg's (and others similarly-situated) in making the promotion decision. As respondent's annual instructions to internal evaluators, cited by the district court, state: "By this process, it is hoped that all significant information with respect to the services and accomplishments of faculty members are rendering within their department, within their college, within their scholarly field, and within the University will be brought out and compared with the services and accomplishments of other colleagues with the same or similar duties." (JA-2282) (emphases added). And, contrary to petitioner's suggestion, Somberg and Bennun were similarly situated and both

evaluated in light of the same criteria, identically weighed.

4. Rutgers argues that the district court and the Court of Appeals should not have "substituted" their judgments for the peer review process by which Rutgers makes promotion decisions. Absent, petitioner claims, a "smoking gun", respondent could never prevail on his claim of intentional discrimination. In so submitting, Rutgers simply misstates the law, both with regard to Title VII claims generally, and to those cases arising in a university setting.

In Washington v. Davis, 426 U.S. 229, 241-42 (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1976), this Court made clear that, to establish intentional discrimination, a plaintiff may prove that, in his case, the

decision-maker significantly diverged from the substantive standards it applied to other like persons or entities. The same principle applies in employment discrimination cases. See, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Trans World Airlines Inc. v. Thurston, 469 U.S. 111, 121 (1985).

Proof of differential treatment between similarly-situated persons raises an inference of impermissible discrimination which a defendant must meet by the articulation of some non-discriminatory basis for the challenged decision. Burdine, 450 U.S. at 255. As the district court properly explained, "If the defendant meets this burden the inference of discrimination created by the prima facie case is eliminated and the burden shifts

back to the plaintiff who must prove by a preponderance of the evidence that the reasons asserted by the defendant were a pretext for discrimination. Id. at 253.

The plaintiff may meet this burden either directly, by showing that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the asserted reason is unworthy of credence. Id. at 256.

5. Here, the district court applied precisely this analytical framework and concluded that (a) the respondent had demonstrated qualifications sufficient to merit promotion to full professor and (b) Rutgers' effort to explain why Somberg, the Caucasian professor from respondent's department promoted the year before he was denied advancement, was promoted were "incredible" and unworthy of belief. (JA-2309).

Rather than focus on the explanation offered by Vice President Alexander Pond, who was not at Rutgers in 1979-80, the district court carefully evaluated the promotion packets of Somberg and Bennun and evaluated the testimony of those involved in the promotion decisions before concluding that there was simply no non-discriminatory manner in which fair evaluators could rate them comparable in the heavily-weighted areas of research accomplishment and scholarly activity.

While internationally famous scientists, who cited specific contributions he had made to his field, supported Bennun's promotion, Somberg lacked any such support. While Bennun had extensive refereed publications and grant support and been invited to give numerous presentations before international scientific meetings, Somberg lacked such

objectively-ascertainable credentials.

Despite Bennun's vastly superior record, petitioner's Biochemistry Section, required by university regulations to rate candidates only for research accomplishments and scholarly activity, supported Somberg's promotion but not, the next year, Bennun's. Moreover, the district court found that the Promotion Review Committee, chaired by then Provost Joseph Young, applied different substantive standards to Bennun than it had to Somberg. It required Bennun to show that he had "become an influential investigator on the national and international scene", while requiring Somberg to show only that she was "intellectually alive". (JA-2296).

The district court properly concluded that these, among many other variances in substantive standards of evaluation,

demonstrated that Rutgers had intentionally discriminated against respondent on the basis of his national origin.

6. The Court of Appeals likewise properly performed its reviewing role: it too found that Bennun had shown sufficient bona fides "to meet the qualification prong of the prima facie case." (50a). The court then found that the record "amply" showed that Somberg was "treated more favorably than Bennun". (51a). Specifically, the Court of Appeals affirmed the district court's finding that petitioner's explanation for the denial of respondent's promotion--"because the University evaluators though his research was deficient" (51a)--was pretextual.

After upholding the district court's comparison of Somberg and Bennun (54a-55a), the Court of Appeals noted the record support for the finding of pretext:

the Appointments and Promotions Committee found Somberg's publications "above average in quantity", while characterizing as questionable Bennun's far superior output. (56a). As the Court of Appeals concluded, "Over a fifteen year period (1964-1979) Somberg had eighteen fewer publications than Bennun did over a twelve year period (1969-1981). These facts indicate that it is not an unwarranted invasion of the college's tenure process to determine that Bennun was held to higher standards in objective terms." (Id.). (emphasis added).

The Court of Appeals identified another clear indication of double standards in the Biochemistry Section's evaluations of the two candidates. "the section rates candidates only on their research and scholarly activity. Yet the section wrote that Somberg's `recent

publications [were] evidence of continuing research activity,' (JA at 1832), while Bennun was downgraded because his `total output [was] insufficient.' (JA at 1256). This conclusion is surprising because Somberg only published three pieces over the three years prior to her promotion (1976-1979) while Bennun published eight pieces in the three years (1978-1981) prior to his promotion denial in 1980-81. The section recommended Somberg for promotion despite the fact that her recent career production was inferior to Bennun's. This is another clear example of the disparate treatment that Bennun was subjected to." (56a-57a).

7. In response to Rutgers' suggestion that Somberg was promoted because she received one "outstanding" rating and Bennun received none, the Court of Appeals sagely noted, "But if

throughout the promotion process the same standards applied to Somberg had been applied to Bennun, an unbiased observer might reasonably conclude that Bennun should have gotten at least one outstanding rating." (57a).

Put another way, the Court of Appeals found that Bennun's strengths were not "given the same overall weight as were Somberg's. In one of Bennun's strongest areas, research accomplishments, he was held to a higher standard than Somberg. Rutgers' articulated non-discriminatory reliance on the five criteria, taken as a whole, in deciding not to promote Bennun is so undermined by its inconsistency in applying them that we cannot hold the district court's finding was clearly erroneous." (58a).

8. In affirming the district court's decision, the Court of Appeals paid proper

deference to the peculiar fact-finding function conferred on district courts. Here, Judge Politan simply did not believe petitioner's witnesses. He found their explanations of their ratings incredible and not worthy of belief. From this, the district court quite properly inferred pretext and ruled for plaintiff. As the Third Circuit more eloquently stated: "The district court found Rutgers' reasons `unworthy of credence.'" Burdine, 450 U.S. at 256 (citing McDonnell Douglas Corp., 411 U.S. at 804-05). The district court, not this court, finds facts and assesses credibility. Like any fact-finder, it can accept some parts of a party's evidence and reject others. It may also, like any factfinder, assess credibility in light of the maxim, falus in uno, falsus in omnibus... We are unable to say, as a matter of law, that it erred

in its determinations." (55a-56a).

Nor should this Court second-guess the judgment entered below--that Rutgers engaged in intentional discrimination when it denied Bennun promotion to the rank of full professor.

B. THE DECISIONS BELOW CONFLICT WITH NO PRECEDENT OF THIS COURT

1. Rutgers would have this Court grant a gaping exception to Title VII for this nation's colleges and universities. Yet, the 1972 amendments to Title VII were enacted expressly to bring such entities within the compass of civil rights legislation. University of Pennsylvania v. E.E.O.C., 110 S. Ct. 577, 582 (1990) ("This extension of Title VII was Congress' considered response to the widespread and compelling problems of invidious discrimination in educational institutions.").

As Justice Blackmun pointed out for a unanimous court in University of Pennsylvania, "Significantly, opponents of the extension claimed that enforcement of Title VII would weaken institutions of higher education by interfering with decisions to hire and promote faculty members." Id. And, in language equally applicable here, the Court rejected petitioner's argument that concern for "academic freedom" should override the national objective of ridding universities of invidious racial discrimination: "Petitioner therefore cannot seriously contend that Congress was oblivious to concerns of academic autonomy when it abandoned the exemption of educational institutions." Id.

2. Moreover, not only did University of Pennsylvania, supra., generally rebuke the position taken here by petitioner: it

specifically considered and rejected its central argument--that the court cannot compare the credentials of like-situated college faculty members to discern impermissible discriminatory conduct. To the contrary, this Court found that the promotion packets of other faculty members may be highly relevant in assessing claims of discrimination in promotion, quoting approvingly from the Third Circuit's opinion in EEOC v. Franklin & Marshall, 775 F.2d 110, 116 (1985), cert.denied, 476 U.S. 1163 (1986): "...[C]onfidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure...", at 110 S.Ct. 584. if this Court intended to prohibit courts from comparing the qualifications of those being considered for tenure and promotion, it would have

chosen far different language to express this intention.

3. Just as accepting Pennsylvania's First Amendment arguments would have vitiated Title VII in University of Pennsylvania, supra., at 585, accepting Rutgers' contentions here would yield to "no limiting principle". Many employers would be encouraged to claim that they too employ highly subjective bases in making employment decisions and that people who otherwise appear similarly situated, i.e., members of the same department at the same time, are really quite different for purposes of comparison. In such manner, any exception to Title VII's requirement that courts make searching inquiry into employment decisions to ferret out and prevent discrimination would be eviscerated in a flood of claimed objections based upon the allegedly

subjective nature of the challenged employment decision.

4. In seeking the writ here, Rutgers does not point to any precedent which the decisions below contravene. The Third Circuit decision does not impinge in any manner on any valid First Amendment right possessed by petitioner. Cf., University of Pennsylvania, supra., at 587. Nor have the courts below engaged in the second guessing of legitimate academic judgments. Id. Instead, they have enforced Title VII in a manner similar to that of numerous other courts, without any of the disastrous impact petitioner predicts.

5. Other courts have made the same searching analysis as the district court below and reached the same conclusion. Indeed, such a comparative analysis is the only means by which the discrimination Congress sought to root out through the

1972 amendment to Title VII can effectively be identified and eliminated.

Rutgers surely would prefer a regime in which universities are immune from the searching analysis engaged in below. But, Congress has determined that this would unduly perpetuate discrimination in higher education and has rejected the immunity from suit petitioner seeks.

6. Nor do the cases Rutgers cites show a different analytical framework than that employed by the courts here. In Villanueva v. Wellesley College, 930 F.2d 124 (1st Cir. 1991), an assistant professor sued after being denied tenure. Upholding the district court's grant of summary judgment for the college, the First Circuit held that Villanueva had failed to show that the college's "articulated reason for the tenure decision was `obviously weak or im-

plausible' or that the standards were `manifestly unequally applied.'" (at 131). In reviewing plaintiff's effort to meet these standards, the First Circuit compared, just as the courts below did, the aggrieved candidate's credentials with those of others from his department who were contemporaneously given tenure.

Unlike the result reached here, where the district court concluded that petitioner's reasons for denying Bennun promotion were "incredible" and the Court of Appeals found the standards applied to him "clearly" different from those applied to Dr. Somberg, the First Circuit reached a contrary conclusion in Villanueva. Other than the difference in outcome, explainable by the specific facts of each case, there is no methodological difference between these cases which requires reconciliation or resolution by this

Court.

7. Nor is the Third Circuit's decision below inconsistent with its own prior holding in Kunda v.Muhlenberg College, 621 F.2d 532, 548 (3rd Cir. 1980), where the Court of Appeals made quite clear that district courts could most certainly prevent subjective standards, precisely like those employed here, from being "used as the mechanism to obscure discrimination."

In reviewing the evidence below, both the district court and the Third Circuit reached precisely that conclusion: that Rutgers had dressed its discrimination against Bennun up in the criteria of subjectivity when its actual intent was to deprive him of promotion on the prohibited basis of his national origin. Uncovering this ruse and exposing it for what it is does not violate, but rather vindicates,

Title VII.

C. PETITIONER SEEKS TO DISTORT THE FINDINGS OF FACT MADE BELOW

Rather than perform a "subjective" analysis and "second guess" the university decision-makers, the courts below sought to verify that the bases adduced by them for their action comported with the facts. Finding, to the contrary, that the facts give the lie to the reasons Rutgers articulated for denying Bennun promotion, the courts found the university's explanations unworthy of belief and pretextual.

In its petition, the university continues the same pattern of distortion it sought--without success--use below. It selectively analyzes the evidence and attempts to pick, choose and then present without context those morsels which might cause a reviewing court to find the

district court's findings of fact clearly erroneous.

Some matters Rutgers cannot change, however. First, Bennun had numerous refereed publications, more than three times as many as did Somberg during the relevant time. Second, those vouching for the high quality of Bennun's contribution to science through these writings were world-renowned scientists, including Nobel Prize winners. Somberg had no external peer reviewer of high reputation support her candidacy for promotion. Third, Bennun had received much more external funding support than Somberg, another piece of evidence supporting his reputation and the quality of his research. According to the participants in the promotion process, these were precisely the factors the evaluators were supposed to consider in deciding whom to

promote. Fourth, the promotion process was to be bounded by written materials included in the promotion packet. Contrary to Rutgers' contention, the district court properly noted that while the Zoology and Physiology Department more highly rated Somberg's teaching, the objective evidence supporting this evaluation was lacking. Bennun taught a more diverse course load. The two had strikingly similar student evaluations for their teaching.

While Rutgers seeks to insulate its promotion decisions from review by characterizing these matters all as "subjective", the courts below deemed these matters "objective"--that is, amenable to comparison without involving the court in its own determination of whose work was better and why. Rutgers has presented no persuasive argument to

the contrary.

Moreover, again contrary to Rutgers' position, as a finding of fact, Judge Politan determined that petitioner's allegedly non-discriminatory articulation was "incredible", not worthy of belief and, therefore, could not have been "honestly held". (Petition at 21).

D. THE DECISIONS BELOW WILL NOT TILT THE EQUILIBRIUM FROM CAREFUL JUDICIAL REVIEW OF CONTESTED ACADEMIC DECISIONS

The Third Circuit has been at the forefront of the application of employment discrimination law to the university. Its recognition of Congressional intent--to purge the academic workplace of discrimination--has been balanced by a searching inquiry to insure that university decision-making is overruled only when promotion and tenure decisions carry forward prohibited discrimination.

Institutions like Rutgers may continue to rely on subjective judgments in tenuring and promoting staff, but, at the same time, must exert sufficient centralized control over such decisions to insure that invidious discrimination is not affecting or controlling them.

Such a procedure fully comports with Congressional intent and is respectful of one central role of the university in this society--to carry forward the values of tolerance and civility in a non-discriminatory atmosphere.

Any other regime--particularly one highlighted by less judicial scrutiny--will encourage the re-emergence of the very discriminatory conduct which Congress so plainly sought to countervail through the 1972 amendments.

CONCLUSION

FOR THESE REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

MICHAEL H. SUSSMAN
1 Harriman Square
Goshen, New York 10924
(914) 294-3991
Counsel for Respondent
Bennun

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Goshen, New York